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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

ROBERT E. FITZGERALD, JR.,
EDWARD J. CALIHAN, JR.,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Respondent.

Gunthorp-Warren Printing Company, Chicago • 346 1717 [redacted]56

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

The Respondent, Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Local 134) opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by the Petitioner, International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter referred to as ITT).

STATEMENT OF THE CASE.

Local 134 accepts the statement of the case by ITT through the first full paragraph on Page 4 of the Petition which states that the attorney for the National Labor Relations Board (hereinafter, Board) who prosecuted the unfair labor practice case was the same person who presided at the 10(k) hearing.

However, it is factually incorrect for Petitioner to state that the Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of the Board's order, as it was Local 134 which filed a petition to review and set aside the order of the Board, and the Board filed a cross application for enforcement.

The further contentions set out in the statement of the case, that the Court of Appeals accepted fully, both the Board's jurisdictional determination and its unfair labor practice decision, is disputed by Local 134. In its petition to review and set aside the Board's order, Local 134 presented in its statement of issues, seven separate issues for determination by the Court of Appeals. These issues concern three main categories of arguments, which are as follows: (1) Violations of the Administrative Procedure Act (hereinafter APA) by the Board in the conduct of both of its hearings; (2) other violations of procedural due process and of law in the conduct of the 10(k) hearing itself and (3) other violations of procedure and law by the Board in its conduct of its unfair labor practice hearing.

However, the Court did not consider, nor pass upon, all of the arguments presented by Local 134 as to all of the issues because it found that the clear violation of the APA served as a basis for denying enforcement of the Board's award. On this point, the arguments of Local 134 as to violations of the APA were of two-fold in nature. The first argument was that which was accepted by the Seventh Circuit for the denial of enforcement, namely the commingling of adjudicative and prosecutorial functions in the same employee of the Board. However, the

second argument concerning a violation of the APA was the failure of the Board to assign one of its administrative law judges to hear the 10(k) proceedings. The Seventh Circuit did not specifically rule upon the second APA violation argument in light of its finding that the first argument had merit.

ARGUMENT.

I. Lack of Direct Conflict Between Circuits.

ITT states as its primary reason for granting of the petition, the allegation that this decision of the Seventh Circuit is in *direct* conflict with a decision of the Circuit Court of Appeals for the District of Columbia. This is erroneous because the decision of the District of Columbia Circuit relied upon is *Bricklayers, Masons, and Plasters International Union* v. *N. L. R. B.*, 475 F. 2d 1516. In the *Bricklayers'* case the issue decided by that Court was the second issue argued by Local 134 to the Seventh Circuit, namely that the Board had violated the APA by its failure to appoint an administrative law judge to hear the 10(k) proceedings. However, the Seventh Circuit did not address itself to that argument by Local 134 because it found merit to the initial argument concerning the violation of the APA, namely the commingling of functions. Therefore, there can be no *direct* conflict between the decision of the Court of Appeals for the District of Columbia and the Seventh Circuit Court of Appeals in the instant case because the decision in the *Bricklayers'* case did not decide the question of the commingling of functions since that question was not before it.

This Court has long held that it will not accept as a basis for its granting a petition, an alleged conflict between the Circuits, where in fact no real conflict exists. There are numerous reasons which the Court has used to deny a petition when no real conflict between the Circuits exist. One of the bases for denial is where the decision below can be sustained on an independent or

alternative ground even though a conflict between the Circuits on an otherwise important issue may exist. *The Monrosa* v. *Carbon Black Inc.*, 359 U. S. 180. This Court said:

> "While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bills of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." 359 U. S. 180 at page 184.

The petition by ITT is a clear example of an attempt to create a conflict between Circuits where no direct conflict exists and where the decision below may be sustained on independent grounds.

A separate basis for this Court having denied a writ of certiorari is a situation where the Court will be able to decide the case on another ground, and thus not reach the point upon which there is a conflict. *Sanson Hosiery Mills* v. *NLRB*, 334 U. S. 863 and *The Arlington Inc.* v. *Mayer*, 399 U. S. 965.[1] In the instant case, this Court may sustain the decision of the Seventh Circuit on the ground that there was a clear violation of the APA by the improper commingling of adjudicative and prosecutional functions. By doing so, this Court need not reach the point concerning the need for an administrative law judge to hold the 10(k) hearings, as was stated by the Seventh Circuit as obiter dicta in the instant decision.

Yet another basis for denying a writ is a case where the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, *Sommerville* v. *U. S.*, 376 U. S. 909.[2] Even assuming that a clear conflict exists, any resolution of the requisite for an administrative law judge to hear the jurisdictional dispute, is irrelevant to the ultimate outcome of the case

1. See R. Stern & E. Gressman, Supreme Court Practice, page 157 (4th ed., 1969).

2. Stern & Gressman, *supra*, p. 158.

before the Court. If that question is resolved, the decision of the Seventh Circuit would stand and deny enforcement of the NLRB order, because it is based on the APA violation of an improper commingling of functions. Further, there are other, as yet unresolved, issues which were raised by Local 134, that would require decision by that Court. Thus, a determination by this Court on the question of the necessity for an Administrative Law Judge, would be irrelevant to the ultimate outcome of this case.

Therefore, it is clear that the Court has not, and will not, automatically grant a writ of certiorari upon the contention that a direct conflict between Circuits does exist. Local 134 submits to the Court that no such direct conflict does exist. However, even if the alleged direct conflict did exist, this Court should not grant the writ for the variety of reasons set out above.

II. No Important Question of Federal Law.

The petition of ITT contends, as a second basis for this Court to grant the writ, the contention that the decision raises an important question of federal law that should be decided by this Court. ITT's petition contends that the Seventh Circuit's decision, that a 10(k) proceeding is an adjudication within § 554 would lead to many procedural problems. These alleged procedural problems are: first, the requirement that a jurisdictional dispute hearing be conducted by an administrative law judge under § 556; second, that the Judge render a recommended decision as required by § 554(d) and § 557; third, that the parties have an opportunity to submit proposed findings and conclusions before the recommended decision is reached; and fourth, a party could take exceptions to that decision after issued as required by § 557(c). While all of the above requirements are procedural rights which Local 134 and other parties before 10(k) proceedings may be desirous of obtaining, such consequences do not necessarily follow from the Seventh Circuit's decision. All that specifically must follow from the Seventh

Circuit's decision is that the Board cease its conduct of engaging in the gross violation of the APA by commingling the prosecutorial and adjudicatory function in the same individual. This is a matter that can obviously be easily remedied by the NLRB. Indeed the Petition of ITT concedes this fact, and admits that the NLRB does not ordinarily commingle the functions by assigning the same person to these tasks in related 10(k) and unfair labor practice hearings.

The ease of accomplishing this procedural remedy can be clearly seen from the fact that the Board did not consider the Seventh Circuit's decision sufficiently onerous to require it to file its own Petition for Certiorari. The Board has closed the original case on its records by letter dated February 6, 1974.[3]

The Board may well file a memorandum with this Court, urging that it did not violate the clear prohibitions of Section 554 of the APA and the rationale of *Wong Yong Sung* v. *McGrath*, 399 U. S. 33. However, the Board's failure to file a

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3. NATIONAL LABOR RELATIONS BOARD
Region 13
881 Everett McKinley Dirksen Building
219 South Dearborn Street, Chicago, Illinois 60604
Telephone: (312) 353-7597

February 6, 1974

Robert E. Fitzgerald, Jr., Esq.
53 West Jackson Boulevard, Suite 1112
Chicago, Illinois 60604

Re: Local No. 134, International Brotherhood of Electrical Workers
(ITT Communications Equipment and Systems Division)
Case No. 13-CD-209

Dear Sir:

This is to advise you that we have closed our records in the above-entitled case.

Very truly yours,
/s/ Ross M. Madden
Ross M. Madden
Regional Director

Petition appears to indicate that it is taking an enlightened view and in the future will separate the performance of the two functions into different individuals.

CONCLUSION.

The petition should be denied because there is no direct conflict between Circuits on substantive issues and because there is no important question of federal law which must be decided by this Court. Further the decision of the Seventh Circuit is a correct interpretation of the Administrative Procedure Act as exemplified by this Court's decision in *Wong Yong Sung* v. *McGrath, supra,* because it prohibits the unlawful commingling of the prosecutorial and adjudicatory functions. As was clearly stated by this Court in the decision of *NLRB* v. *Brown,* 380 U. S. 278.

> "Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation; *National Labor Relations Board* v. *Babcock and Wilcox Co.*" 350 U. S. 278 at page 299.

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cc: John D. O'Brien, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
Chicago, Illinois 60604

Jerome Schur, Esq.
Katz & Friedman
7 South Dearborn Street
Chicago, Illinois 60603

Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO
600 West Washington Street, Chicago, Illinois 60606

Communications Workers of America, AFL-CIO
7460 North Sheridan Road, Chicago, Illinois 60626

International Telephone & Telegraph Corp., Communications Equipment and Systems Division
191 Biesterfield Road, Elk Grove Village, Illinois 60007

ITT-Communications Equipment and Systems Division
60 Washington Street, Hartford, Connecticut 06106

In the instant case the Board's decision was based upon an erroneous legal foundation and was correctly denied enforcement by the Seventh Circuit.

For the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
ROBERT E. FITZGERALD, JR.,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Respondent.

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vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES V. KOONS,
IRVING M. FRIEDMAN,
JEROME SCHUR,
HAROLD A. KATZ,
Attorneys for CWA.

KANE & KOONS,
1100 Seventeenth St., N. W.,
Washington, D. C. 20036.

KATZ & FRIEDMAN,
7 South Dearborn,
Chicago, Illinois 60603.

Gunthorp-Warren Printing Company, Chicago • 346-1717 86

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LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Respondent, Communications Workers of America (hereinafter CWA) makes this statement in response to the Petition for Writ of Certiorari filed by International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter ITT-CESD). CWA was a party in all the proceedings below.

CWA supports the Petition for a Writ of Certiorari.

CWA adopts the Petition of ITT-CESD in its entirety.

For the reasons set out in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

CHARLES V. KOONS,
IRVING M. FRIEDMAN,
JEROME SCHUR,
HAROLD A. KATZ,
Attorneys for CWA.

KANE & KOONS,
1100 Seventeenth St., N. W.,
Washington, D. C. 20036.

KATZ & FRIEDMAN,
7 South Dearborn,
Chicago, Illinois 60603.

In the Supreme Court of the United States

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INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, PETITIONER

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. Following a hearing conducted pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. 160(k), the Board issued a decision awarding certain disputed work to the employees of petitioner Company represented by the Communications Workers of America rather than to those represented by respondent Local 134 (Pet. App. C, 1c-17c). When Local 134 refused to abide by the Board's award and continued to exert economic pressure on the Company for the work, an unfair labor practice complaint issued against Local 134 and the Board, after further hearing, found that Local 134 had violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D). The Board ordered Local 134 to cease its unlawful conduct (Pet. App. B, 1b-24b).

The court of appeals held that the Board's findings and conclusions were supported by the record (Pet. App. A, 4a-6a). However, it declined to enforce the Board's order on the ground that, since "the hearing officer in the §10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the §8 Unfair Labor Practice Hearing," the Board's procedure violated Section 554 of the Administrative Procedure Act, 5 U.S.C. 554 (Pet. App. A, 6a).[1] The court based its conclusion on the premises that "[i]t is apparently admitted that §554 applies to §10(k) hearings" (Pet. App. A, 8a), and that "the §10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of §556" (*id.* at 8a, n. 3).[2]

2. The basic question presented by the petition is whether a proceeding to resolve a jurisdictional dispute under Section 10(k) of the National Labor

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[1]Section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," provides, in relevant part, that:

> (d) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * *, except as a witness or counsel in public proceedings. * * *

[2]Section 556(b) of the Administrative Procedure Act provides, in relevant part, that, in hearings required to be conducted in accordance with Section 554, "[t]here shall preside at the taking of evidence * * * one or more hearing examiners appointed under section 3105, of this title." Section 3105, in turn, provides that hearing examiners "may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

Relations Act is an "adjudication" within the meaning of the Administrative Procedure Act, so that the provisions of the latter Act respecting adjudications are applicable to Section 10(k) proceedings. The Board believes that the court of appeals erred in answering that question affirmatively.[3] Moreover, its decision on that question conflicts with that of the District of Columbia Circuit in *Bricklayers, Masons and Plasterers Int'l Union* v. *National Labor Relations Board*, 475 F. 2d 1316, 1318-1321. The Board did not file a petition for a writ of certiorari in the present case, however, because it concluded that it presented the issue of the

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[3]A Section 10(k) proceeding is not an "adjudication" within the meaning of the Administrative Procedure Act because it is not a "final disposition * * * of an agency" (5 U.S.C. 551(6)). See *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116, 126-127; *Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341. Moreover, the court of appeals misconceived the role of a hearing officer in a Section 10(k) proceeding:

> The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of pertinent facts as may be necessary for a determination of the issues by the Board. * * * At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute. [29 C.F.R. 101.34; Pet.App. F. 2f.]

applicability of the Administrative Procedure Act in a factual setting which was not likely to recur.[4]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

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[4]It is not general practice to use the same person who hears the Section 10(k) case to investigate and prosecute the subsequent Section 8(b)(4)(D) case. See *Int'l Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626, 628-629.